



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region08

Ref: 8P-AR

NOV 12 2015

William Allison, Director
Air Pollution Control Division
Colorado Dept. of Public Health and Environment
4300 Cherry Creek Dr. South
Denver, Colorado 80246

RE: EPA Region 8 Comments on Colorado's Draft Revisions to Affirmative Defense Provisions in Common Provisions Regulations II.E. and II.J.

Dear Mr. Allison:

Thank you for the opportunity to provide comments on the state of Colorado's draft SIP revisions to address the EPA's final rule, "Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction" ("SSM SIP Call"), 80 FR 33840 (June 12, 2015).

The EPA's original proposal for the SSM SIP Call, 78 FR 12460 (Feb. 22, 2013) ("SSM SIP Call Proposal"), proposed to call Colorado's SIP with regard to affirmative defense provisions for excess emissions during startup and shutdown. Our subsequent supplemental proposal, 79 FR 55920 (Sept. 17, 2014) ("SSM SIP Call Supplemental Proposal"), proposed to call Colorado's SIP with regard to affirmative defense provisions for excess emissions during startup, shutdown, and malfunctions. The final SSM SIP Call finalized the EPA's determination under section 110(k)(5) of the Clean Air Act ("CAA" or "Act") that Colorado's existing affirmative defense provisions in sections II.E and II.J of Colorado's Common Provisions are substantially inadequate to comply with the requirements of the Act.

We want to acknowledge that these existing affirmative defense provisions were originally approved by the EPA into the Colorado SIP in 2006 (II.J) and 2008 (II.E) after a collaborative effort by the state that included the EPA, and that the SSM SIP Call for these provisions is the result of the EPA's subsequent changes in interpretation of the requirements of the Act. These changes in interpretation are the result of the EPA's reevaluation of the legal basis for affirmative defenses in SIP provisions in light of the legal reasoning of a recent court decision. As explained in detail in the SSM SIP Call Supplemental Proposal and the final SSM SIP Call, the EPA has now determined that affirmative defense provisions in SIPs are inconsistent with the legal requirements of the CAA.

Our comments are detailed below. Our preliminary assessment is that the draft SIP revision contains a number of issues that call into question whether it can be approved by the EPA. In forming our preliminary assessment, we have initially reviewed Colorado's August 20, 2015 rulemaking

package, including supporting materials such as the Memorandum of Notice, the pre-hearing and rebuttal statements from parties to the rulemaking that the Air Pollution Control Division (APCD) has provided to the EPA, and the revised rule language provided in the APCD's rebuttal statement. However, we will not reach any final conclusions until the state of Colorado completes its rulemaking process and provides a formal submission of the intended SIP revision containing the final language to the EPA, after which the EPA will conduct its own notice and comment rulemaking. In that separate EPA rulemaking process, we will consider any comments concerning the intended SIP revision under discussion in light of the CAA and the EPA's guidance interpreting the CAA for SIP provisions.

1. Applicable Requirements for Colorado's SIP Revision in Response to the SSM SIP Call

Section 110(a) requires that states have SIPs that provide for implementation, maintenance, and enforcement of the NAAQS and that meet applicable requirements of the CAA. Under section 110(k), the EPA must approve SIP submissions that meet all of the applicable requirements of the CAA and disapprove those that do not. Similarly, section 110(l) of the Act prohibits the EPA from approving a SIP revision that would interfere with (among other things) any applicable requirement of the Act.

One applicable requirement is provided by section 110(a)(2)(A) of the Act, which requires every SIP to "include enforceable emission limitations and other control measures, means, or techniques." Similarly, section 110(a)(2)(C) requires states to have programs for enforcement of SIP requirements, including those of section 110(a)(2)(A). The EPA has provided general guidance on our intended interpretation of enforceability under section 110(a)(2)(A), including the following:

- Memorandum from J. Craig Potter, Thomas L. Adams, Jr. and Francis S. Blake to Air Division Directors, Regions I – X, entitled "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency" ("1987 Enforceability Memorandum") (September 23, 1987)¹
- "General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," ("General Preamble") 57 FR 13498, 13556, 13568 (April 16, 1992)

In general, SIP provisions can be enforced under sections 113 and 304 of the Act (as well as under state law). Thus, a SIP revision that interferes with enforceability of SIP requirements under sections 113 and 304 may also interfere with the requirements of sections 110(a)(2)(A) and 110(a)(2)(C). The SSM SIP Call Proposal, SSM SIP Call Supplemental Proposal, and the SSM SIP Call discuss how affirmative defenses for excess emissions in SIPs create a substantial inadequacy in the SIP with respect to the requirements of sections 113 and 304 and the enforcement structure of the CAA more broadly. In part, the EPA has adopted the legal reasoning of the D.C. Circuit in *NRDC v. EPA*, ("NRDC"), 749 F.3d 1055, 1063 (D.C. Cir. 2014), in finding that affirmative defense provisions are contrary to the enforcement structure of the Act. As the EPA explained:

A judicial decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *NRDC v. EPA* concerning the legal basis for affirmative defense provisions in the EPA's own regulations caused the Agency to reconsider the legal basis for any affirmative defense provisions in SIPs, regardless of the type of events to which they apply, the criteria they may contain or the types of judicial remedies they purport to limit or eliminate.

¹ A copy of this memorandum is attached to this comment letter.

SSM SIP Call, 80 FR at 33851.

Affirmative defense provisions by their nature purport to limit or eliminate the authority of federal courts to find liability or to impose remedies through factual considerations that differ from, or are contrary to, the explicit grants of authority in section 113(b) and section 113(e). These provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain or what forms of remedy they purport to limit or eliminate.

SSM SIP Call, 80 FR at 33981. However, the fact that the logic of the *NRDC* decision provides part of the basis for the EPA's interpretation of the Act does not mean that a state's SIP revision in response to the SSM SIP Call can be "narrowly tailored" merely to address the *NRDC* decision. While the EPA's interpretation of the Act with respect to the lack of any legal basis for affirmative defenses in SIPs is informed by the *NRDC* decision, it is the EPA's interpretation of the applicable requirements of the Act (and not the *NRDC* decision) that would govern our notice-and-comment rulemaking on Colorado's SIP revision.

As we explained above, when Colorado submits a SIP revision to address the SSM SIP call, the EPA would then have the authority and responsibility to determine through notice-and-comment rulemaking whether the SIP revision would interfere with applicable requirements of the Act as interpreted by the EPA. These legal requirements of the CAA include the enforcement structure of the CAA, as provided in section 304 and section 113, and as recently interpreted by the D.C. Circuit. As explained below, our preliminary view is that the draft SIP revision might interfere with several requirements of the Act, regardless of whether or not it is "narrowly tailored" to address the *NRDC* decision.²

2. The Draft SIP Revision May Interfere with Sections 110(a)(1), 110(a)(2)(A), 110(a)(2)(C), 113, and 304 of the Act

The EPA's guidance on enforceability in SIPs under section 110(a)(2)(A) states, among other things, that SIP provisions should be "clear," "unambiguous," "enforceable in practice," and "sufficiently specific so that a source is fairly on notice as to the standard [of conduct] it must meet." General Preamble, 57 FR at 13568; 1987 Enforceability Memorandum at 8. Based on the EPA's intended interpretation of section 110(a)(2)(A) as expressed in our guidance, our preliminary view of the draft SIP revision is that it may interfere with section 110(a)(2)(A) (and consequently 110(a)(2)(C) as well). We are concerned that a SIP provision that states that it may or may not be adopted or considered by a federal court at the court's discretion may not put sources fairly on notice as to the possible penalty consequences of noncompliance with emission limits. It also appears that the provision may interfere with enforceability in practice, given that it could create additional (and unnecessary) issues that parties to an enforcement action might have to brief and a court to decide, in much the same way that an ambiguous provision for another, substantive requirement could create additional (and unnecessary) issues to brief and decide. This concern would be exacerbated by language stating that a court may "adopt" the State's affirmative defense, as it is unclear how a court can do so while carrying out its obligation to consider the mandatory statutory penalty factors enumerated in section 113(e) of the Act.

² The EPA notes statements in the rulemaking record for Colorado's proposed revisions about the cooperative federalism structure of the Act. Our comments about the EPA's role in reviewing Colorado's SIP revision are, in our preliminary view, consistent with that structure. See *Okla. v. U.S. EPA*, 723 F.3d 1201, 1207-10 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 2662 (2014); see also SSM SIP Call, 80 FR at 33876-79.

In our preliminary view, rebuttal statements from industry and APCD to the effect that the draft SIP revision would improve clarity are mistaken; the simple method to improve clarity for a court as to the scope of Colorado law versus federal law would be to remove the affirmative defense entirely from the SIP.³

The draft SIP revision may interfere with section 113 of the Act in another significant way. If it were approved into the Colorado SIP, it might be misunderstood to apply to the EPA's administrative actions under section 113 of the Act regarding administrative penalties for violation of the SIP. *See* CAA sections 113(a)(1)(B), (a)(2)(B), and (d)(1)(A). As stated in the SSM SIP Call:

The EPA agrees that states may elect to revise their existing deficient affirmative defense provisions to make them “enforcement discretion”-type provisions that apply only in the context of administrative enforcement by the state. Such revised provisions would need to be unequivocally clear that they do not provide an affirmative defense that sources can raise in a judicial enforcement context or against any party other than the state. Moreover, such provisions would have to make clear that the assertion of an affirmative defense by the source in a state administrative enforcement context has no bearing on the additional remedies that the EPA or other parties may seek for the same violation in federal administrative enforcement proceedings or judicial proceedings.

SSM SIP Call, 80 FR at 33866. The draft SIP revision does not appear to make clear that it does not apply to federal administrative enforcement proceedings. In addition, if the draft SIP revision were taken to apply to the EPA's administrative penalty actions, it is unclear how a federal court could review those actions in potential subsequent proceedings given that the federal court would supposedly not be bound by the SIP revision. *See* CAA sections 113(d)(4) and (d)(5).

The draft SIP revision may also interfere with section 304 of the Act. As stated by the D.C. Circuit Court of Appeals:

Section 304(a) creates a private right of action, and as the Supreme Court has explained, “the Judiciary, not any executive agency, determines ‘the scope’ — including the available remedies — ‘of judicial power vested by’ statutes establishing private rights of action.” Section 304(a) is in keeping with that principle. By its terms, Section 304(a) clearly vests authority over private suits in the courts, not EPA. As the language of the statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are “appropriate.”

NRDC, 749 F.3d at 1063 (citations omitted). Thus, the EPA appears to lack authority not only to approve provisions that purport to tell a federal court what it must do, but also to approve provisions such as in the draft SIP revision that purport to tell a federal court what it may do. Instead, in deciding whether civil penalties may be appropriate, a federal court would (in our preliminary view) be bound by section 113(e) of the Act, as interpreted by the courts (not the EPA), and by the evidence before the court that has been admitted under the Federal Rules of Evidence as (among other things) relevant to the civil penalty issue. The D.C. Circuit Court of Appeals also stated:

³ In our preliminary view, our concerns here are similar to those discussed in *US Magnesium, LLC v. U.S. EPA*, 690 F.3d 1157, 1170 (10th Cir. 2012) (“The EPA stated, ... ‘we think the reasonable course is to eliminate any uncertainty about reserved enforcement authority by requiring the State to revise or remove the unavoidable breakdown rule from the SIP.’ In light of the potential conflicts between Utah's SIP and the EPA's reasonable interpretation of the CAA requirements, seeking revision of the SIP was prudent, not arbitrary or capricious.”) (citations omitted).

When a private suit is filed, the defendant can argue that penalties should not be assessed, based on the factors in Section 113(e)(1) such as the defendant's "full compliance history and good faith efforts to comply." EPA can support that argument as intervenor or amicus, to the extent such status is deemed appropriate by the relevant court. But under the statutory scheme, the decision whether to accept the defendant's argument is for the court in the first instance, not for EPA.

Id. (citations omitted). Similarly, the state of Colorado can support a defendant's argument that penalties should not be assessed by a court through intervention or an amicus brief. If a state feels a need to assert its own views in enforcement actions brought by the EPA or other parties, it has the ability to do so. In short, the *NRDC* decision appears to stand for the larger principle that the state of Colorado and the EPA have no authority to opine on (regardless of how it might be couched in terms of discretion) what a federal court may or may not do under section 113(e), except through standard judicial procedures (i.e., intervention or amicus brief).

Finally, under section 110(a)(1) of the Act, SIPs must "provide for implementation, maintenance, and enforcement of" primary and secondary NAAQS. As explained above, the draft SIP revision may interfere with enforceability of the SIP and therefore interfere with section 110(a)(1)'s requirements. In addition, section 110(a)(1) shows that the purpose of the SIP generally is to implement, maintain, and enforce the NAAQS, and, similarly under section 172(c)(1), to attain the NAAQS in nonattainment areas.⁴ Even if the draft SIP revision is modified to avoid interfering with the EPA's administrative enforcement authority under section 113, there does not appear to be an appropriate and rational basis for submitting what may be considered by Colorado to be state-only provisions for adoption into the SIP, just as (for example) state-only odor regulations, which are unrelated to implementation, maintenance, and enforcement of the NAAQS, would typically not be appropriate for adoption into the SIP. It appears the only effect of including the provisions in the SIP would be to give the appearance that the state-only provisions have somehow been endorsed by the EPA through approval and therefore should be adopted by a federal court, which is not an appropriate basis for the EPA's approval. As previously explained, the EPA interprets the CAA to preclude affirmative defense provisions in SIPs and retention of a "state-only" affirmative defense in a SIP provision could easily lead to misunderstandings by regulated entities, regulators, the public, and the courts. This potential for SIP provisions to lead to confusion and to impede the legitimate exercise of the right to pursue enforcement of SIP requirements, including penalties for CAA violations, is an important reason why "state only" provisions should not be included in SIPs. With respect to industry and APCD rebuttal statements that adoption into the SIP would serve the purpose of clarifying Colorado state law for the public and for federal courts, we note two points. First, as mentioned above it appears that the clearest way to make the point about what is state-only versus federally-enforceable would be not to include state-only provisions in the SIP at all. Second, if additional clarity is desired, state-only provisions can be placed in a designated state-only section of a source's title V operating permit.⁵

⁴ There are certain other programs specified in the CAA for inclusion in the SIP, such as protection of visibility in National Parks and certain Wilderness Areas, *see* CAA section 110(a)(2)(J), that do not specifically address attainment of the NAAQS, but the inclusion of such programs in the SIP should not change the general point made here.

⁵ *See generally* "White Paper for Streamlined Development of Part 70 Permit Applications," U.S. EPA, Office of Air Quality Planning and Standards (July 10, 1995) (noting need for "careful segregation of terms implementing the Act from State-only requirements.").

In reviewing the documents provided by APCD, we note that Sierra Club submitted a prehearing statement that recommended specific changes to the rules. It is our preliminary view that these recommended changes would not fully address the EPA's concerns. First, it appears that the Sierra Club's changes only address federal court proceedings under sections 113 and 304; thus the changes do not appear to address the issue of the EPA's administrative proceedings under section 113. Second, the changes do not appear to address the issue of whether it is appropriate for a state-only provision such as this one to be approved into the SIP. Third, the changes do not appear to address the issue that an EPA approval of the SIP revision that does not remove the affirmative defense provisions from the SIP might be misunderstood to reflect the EPA's endorsement of Colorado's state-only provisions and therefore interfere with enforcement under sections 113 and 304. Fourth, the EPA believes that the Sierra Club's suggested revisions purport to tell a federal court what it cannot do (that is, it cannot adopt an affirmative defense), which, as the D.C. Circuit has stated, Congress has decided should exclusively be the province of the federal judiciary. Finally, the changes do not appear to address the issue of possible inconsistency with the EPA's intended interpretation of enforceability requirements under 110(a)(2)(A) as expressed in guidance. Likewise, our preliminary view of the changes proposed by APCD in their rebuttal statement is that they do not appear to address any of the issues identified above.

3. The Rulemaking Record Discusses Other Approaches That May Be Preferable.

As explained in the SSM SIP Call, the EPA interprets the CAA to provide states with broad discretion to determine how best to revise existing SIP deficiencies in response to that action, so long as those revisions comply with CAA requirements for SIP provisions. The EPA notes that in the rulemaking record for the draft SIP submission, the APCD presented alternative approaches for addressing the SSM SIP Call. We want to take this opportunity to provide input on those potential alternative approaches.

One alternative listed in the rulemaking record is elimination of the existing affirmative defense provisions, both from the existing SIP and from state law. This approach would be consistent with CAA requirements, and consistent with the EPA's guidance in the SSM Policy. By eliminating the deficient provisions from the SIP, such a SIP submission would not suffer from the concerns we express above and we anticipate it would be more easily approved, subject to completion of our own notice and comment rulemaking process. We do not anticipate that elimination of the affirmative defenses from state law, as well as from the SIP, would have any impact on the EPA's evaluation of the SIP revision.

Another alternative listed in the rulemaking record is elimination of the existing affirmative defense provisions from the existing SIP, but retention of those provisions in state law. Again, this approach would be consistent with CAA requirements, and consistent with the EPA's guidance in the SSM Policy. Indeed, the EPA specifically addressed this potential approach in the SSM SIP Call. See SSM SIP Call, 80 FR at 33855-56. This approach may also alleviate concerns expressed in the rulemaking record regarding certain Colorado statutory provisions relating to SSM. We note that the statutory provisions do not appear to require Colorado to submit any particular regulations for adoption into the SIP. A SIP revision following this approach would not raise the same concerns we express above and we anticipate that it would be more easily approved, subject to completion of our own notice and comment process. As noted in the SSM SIP Call, such state law provisions should not be worded in such a way as to preclude enforcement by the state for violations of CAA requirements, because this could be problematic for other reasons. *Id.* However, our preliminary assessment is that the existing affirmative defense provisions would not raise this concern.

A third potential alternative listed in the rulemaking record is elimination of the existing affirmative defense provisions and replacement of the provisions with an enforcement discretion provision. As the APCD noted, a properly drafted enforcement discretion provision could use criteria similar to those of the existing affirmative defense provisions, but provide them as criteria that state enforcement officials could use to guide the exercise of enforcement discretion. Presuming that such a provision clearly and unequivocally applies only to the state's exercise of enforcement discretion, this would be consistent with CAA requirements, and consistent with the EPA's guidance in the SSM Policy. SSM SIP Call, 80 FR at 33980-81. With respect to this alternative, removal of the affirmative defense provisions would meet the requirements of the SSM SIP Call. Creation of an enforcement discretion type provision is not required, but would be consistent with the CAA and consistent with the EPA's guidance in the SSM Policy. SIP revisions following this approach would not raise the same concerns we express above and we anticipate that they would be more easily approved, subject to completion of our own notice and comment process.

The fourth alternative listed in the rulemaking record is elimination of the existing affirmative defense provisions coupled with subsequent SIP revisions to create alternative emission limitations that apply during certain modes of source operation. This approach would meet the requirements of the SSM SIP Call by eliminating the affirmative defense provisions. Presuming that the alternative emission limits ultimately developed are consistent with CAA requirements, as explained in the EPA's guidance in the SSM Policy, the SIP revisions creating alternative emission limits would likewise be an appropriate approach. The EPA emphasizes that states are not required to create alternative emission limitations, but may elect to do so in appropriate circumstances. We have provided guidance concerning development of such alternative emission limitations. SSM SIP Call, 80 FR at 33980. SIP revisions following this approach would not raise the same concerns we express above and we anticipate that it would be more easily approved, subject to completion of our own notice and comment process.

We appreciate your request that we be involved in the development of the response to the SSM SIP Call and this opportunity to provide our preliminary views on the draft SIP revision. We hope that this process will result in a SIP revision that will be consistent with the CAA and EPA guidance, so that the requirements of the SSM SIP call can be addressed promptly and efficiently for the benefit of all affected parties. We believe that this process will lead to better protection of public health and the environment in Colorado.

We will provide any assistance needed by APCD to resolve the issues that we have identified and look forward to working with you and your staff. If you have any questions, please contact me at (303) 312-6416, or have your staff contact Adam Clark, lead staff for SSM-related issues, at (303) 312-7104.

Sincerely,

A handwritten signature in black ink, appearing to read "Carl Daly". The signature is fluid and cursive, with the first name "Carl" and last name "Daly" clearly distinguishable.

Carl Daly,
Director, Air Program